Eight Mile Style, LLC et al v. Apple Computer, Incorporated Doc. 94

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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DEFENDANTS AFTERMATH RECORDS' AND APPLE INC.'S REPLY BRIEF IN SUPPORT OF DEFENDANTS' REVISED MOTION FOR SUMMARY JUDGMENT

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CONTROLLING AUTHORITIES

Federal Cases

Allman Brothers v. Sony BMG Music Entertainment,
2008 WL 2477465 at *5 n.3 (June 18, 2008)
Asset Marketing Systems v. Gagnon,
____ F.3d _____, 2008 WL 4138181 at * 8 (9th Cir. Sept. 9, 2008)
Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.,
510 F.3d 77 (1st Cir. 2007)
Danielson v. Winchester-Conant,
322 F.3d 26 (1st Cir. 2003)
Effects Associates, Inc. v. Cohen,
908 F.2d 555 (9th Cir. 1990)
I.A.E. Inc. v. Shaver,
74 F.3d 768 (7th Cir. 1996)
Palmer v. Braun,
376 F.3d 1254 (11th Cir. 2004)
Reinhardt v. Wal-Mart Stores, Inc.,
547 F. Supp. 2d 346 (S.D.N.Y. 2008)
Rodgers & Hammerstein Org. v. UMG Recordings, Inc.,
2001 WL 1135811 (S.D.N.Y. 2001)
Sparks v. Wal-Mart Stores, Inc.,
361 F. Supp. 2d 664 (E.D. Mich. 2005)
Tang v. Putruss,
521 F. Supp. 2d 600 (E.D. Mich. 2007)

State Cases

Blumenfeld v. R.H. Macy & Co.,
92 Cal. App. 3d 38 (1979)
BMW of North America, Inc. v. New Motor Vehicle Bd.,
162 Cal. App. 3d 980 (1984)
Ghirardelli v. Peninsula Properties Co.,
16 Cal. 2d 494 (1940)
Oakland-Alameda Cty. Coliseum v. Oakland Raiders,
197 Cal. App. 3d 1049 (1988)
Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.,
69 Cal. 2d 33 (1968)
Wolf v. Walt Disney,
162 Cal. App. 4th 1107 (2008)

Federal Statutes

17 U.S.C. § 115(a)(1)
17 U.S.C. § 115(b)
17 U.S.C. § 115(c)(3)(A)
17 U.S.C. § 115(E)(i)
17 U.S.C. § 205(e)
17 U.S.C. § 401(c)
37 CFR 201.18(a)(6)

Other Authorities

Nimmer on Copyright (2007), § 6.10[C]
Nimmer on Copyright (2007), §10.07[B]

I. INTRODUCTION

Nothing in Plaintiffs' Opposition changes the undisputed facts that (1) Jeff Bass and Joel Martin signed agreements in 1998 and 2003, respectively (the "Agreements"), binding their affiliates (including Plaintiffs Eight Mile and Martin Affiliated) to promises that the Compositions "will be licensed" without qualification to who is using them (Aftermath or its "distributors/licensees") or in what format (whether CD, permanent download or otherwise), and (2) since 2003, Bass, Martin and their Plaintiff LLCs have pocketed literally hundreds of thousands of dollars because of the exploitation of the Compositions through permanent downloads. No witnesses who would testify at the bench trial can or will change those basic facts.[1] The uses of the Compositions that Plaintiffs challenge have, as a matter of law, been licensed expressly (through the Agreements and/or numerous other express licenses) or at a minimum they have been licensed impliedly. Summary judgment must be granted.

II. EXPRESS LICENSES AUTHORIZE THE CHALLENGED USE.

A. Under California Law, The Agreements' Clear Language Controls.

The Agreements here provide: "All Controlled Compositions[2] . . . *will be licensed* to Aftermath and its distributors/licensees." Ex. 9a (Hoffman Decl. Exs. A & D at ¶ 6). Plaintiffs' entire case hinges on whether this provision means precisely the opposite of what it says. They contend that "will be licensed" does not mean that compositions *will* be licensed, but instead means that they "*will not* be licensed." *See* Opp. at 12 (Plaintiffs "would not agree to license" any Compositions for digital uses). California law is clear: Plaintiffs cannot transform the plain language of the contract with a competing interpretation to which the language is not "reasonably susceptible." *See Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.,* 69 Cal. 2d

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[1] There is no evidence that Eminem, the artist signed to the Agreements and author/co-author of the Compositions, or his representatives could or would contradict any of this. In any event the parties have stipulated they will not be called as witnesses at trial. LeMoine Decl. Ex. E at 6-13.

[2] Plaintiffs admit that the Compositions are Controlled Compositions, as that term is used in the Agreements.

33, 37 (1968). The contractual language "will be licensed" cannot be susceptible to the exact opposite meaning "will *not* be licensed."

Plaintiffs' strained interpretation is tied to a supposed distinction between licenses that are and are not "self-effectuating." Opp'n. at 4-6; Sullivan Decl. Ex. C-1 at 15. Even if Plaintiffs were correct that the provisions in the Agreements are not "self-effectuating" (and Plaintiffs are wrong), this gains Plaintiffs nothing because *Plaintiffs still must license the Compositions*; stated differently, Plaintiffs' admitted promise that they entered an "agreement to agree" cannot be interpreted to give them a right to *refuse* to agree. *See* Ex. 8b, 320:15 -322:23. But that is exactly what Plaintiffs say they can do here: refuse to license. Plaintiffs try to avoid the fatal flaw in their argument by claiming they just want the flexibility to insist on terms to their liking. This does not save Plaintiffs. The claim that Plaintiffs assert is for copyright infringement – not a claim for different licensing terms – and the infringement claim fails if the use is authorized, which it clearly is. Plaintiffs either granted a license, or they were obligated to grant a license, *i.e.*, they have no right to refuse to license. Either way, Defendants prevail, because the license defeats Plaintiffs' claim of infringement.

In the face of the Agreements' plain language, Plaintiffs advance a series of tendentious backup arguments. They claim that the controlled composition clause does not apply to digital uses,[3] without citing any contractual language in support. All the contractual language points to the opposite conclusion. The Agreements give "Aftermath and its distributors/licensees" the exclusive right to exploit the sound recordings "in any and all forms of media now known and hereinafter developed." Ex. 9a (Hoffman Decl. at Exs. A & D, ¶ 8). Plaintiffs admit that this language gives Aftermath the right to distribute the sound recordings in digital form. Opp. at 18,

[3] At his deposition, Mr. Martin testified that the controlled composition clause constituted an "agreement to agree," and Plaintiffs' counsel clarified that this applied to digital uses as well. Ex. 8b, 320:15-322:23. Although he now tries to distance himself from that testimony, Martin cannot create a fact question by submitting a contradictory affidavit. *Sparks v. Wal-Mart Stores, Inc.*, 361 F. Supp. 2d 664, 669-70 (E.D. Mich. 2005).

n. 21. That is undeniable—two federal courts have held as much. *See Reinhardt v. Wal-Mart Stores, Inc.*, 547 F. Supp. 2d 346, 354-55 (S.D.N.Y. 2008); (Ex. 11b at *5), *Allman Brothers v. Sony BMG Music Entertainment*, 2008 WL 2477465 at *5 n.3 (June 18, 2008). (Ex. 10b at *2).

Instead, Plaintiffs argue that the controlled composition clauses are somehow divorced from the provisions covering future uses. Opp. at 19-22. But the entire contract must be read together, "and every part interpreted with reference to the whole." *Ghirardelli v. Peninsula Properties Co.*, 16 Cal. 2d 494, 496 (1940). The controlled composition clause states that Compositions "will be licensed to Aftermath and its distributors/licensees." The license obviously contemplates distribution *embodied in sound recordings*, and the Agreements authorize distribution "in any and all forms of media now known and hereinafter developed," which undeniably includes digital uses. Ex. 9a (Hoffman Decl., Exs. A & D, ¶ 8).

Plaintiffs next make unavailing legal arguments challenging the clause's validity. First, they argue that a 1995 amendment to 17 U.S.C. § 115 invalidatesd all controlled composition clauses for digital uses. That is wrong. What the statute actually says is that *rates* fixed pursuant to statute apply to "digital phonorecord deliveries" ("DPDs") "*in lieu of*" any different *rate* in a controlled composition clause. 17 U.S.C. § 115(E)(i). While the statute provides for different rates, it does not invalidate the clause's grant of rights. That fact is confirmed by the same Senate Report that Plaintiffs selectively (and misleadingly) quote. In the very next paragraph after the sentence that Plaintiffs quote, the Report states that statutory *rates* "are to be given effect *in lieu of*" any contrary *rates* in a controlled composition clause. Opp. Ex. A-22 at 42.

Second, Plaintiffs argue that the law requires separate "mechanical" (by which Plaintiffs mean physical) and DPD licenses. That is wrong, and Plaintiffs cite nothing to support it. Section 115 does not require separate licenses, and the implementing regulations specifically provide that a DPD is "treated as a phonorecord" for the purposes of that section. 37 CFR

201.18(a)(6).[4] Neither does *Rodgers & Hammerstein Org. v. UMG Recordings, Inc.*, 2001 WL 1135811 (S.D.N.Y. 2001) hold that the law requires separate mechanical and DPD licenses. That case construed the terms of a particular license that used express language limiting its scope to a specific physical configuration. In contrast, the Agreements here *include* the right to distribute the sound recordings (and the compositions embodied within them) in *every* configuration —"in any and all forms of media now known and hereinafter developed." Ex. 9a (Hoffman Decl. Exs. A & D at. ¶ 8).

B. Extrinsic Evidence Cannot Transform The Contractual Language.

If Plaintiffs' competing interpretation is contrary to the contract's plain language, then extrinsic evidence is irrelevant and the plain language governs. *See BMW of North America, Inc. v. New Motor Vehicle Bd.*, 162 Cal. App. 3d 980, 991 n.4 (1984). Even if the extrinsic evidence is considered, it gets Plaintiffs nowhere. Under California law (binding to these contracts), the Court must read the contract to give effect to the intent of the parties *at the time the contract was entered into*. *Oakland-Alameda Cty. Coliseum v. Oakland Raiders*, 197 Cal. App. 3d 1049, 1057 (1988). Plaintiffs do not submit a single piece of evidence from *any* contract drafter or negotiator supporting their interpretation. They submit only Joel Martin's assertion, made years after the fact, that he now says he thought the Agreements did not confer digital rights. Plaintiffs offer no evidence that *at the time the contract was entered into* Martin or anyone else expressed this view. A party's unexpressed intent about what a contract means is irrelevant. *Oakland-Alameda*, 197 Cal. App. 3d at 1058; *Blumenfeld v. R.H. Macy & Co.*, 92 Cal. App. 3d 38, 46 (1979). Martin's claimed "understanding" is unexpressed intent and must be disregarded.

Plaintiffs argue that the performance under the contract—specifically the exchange of licenses with UMG—creates a fact issue as to whether "will be licensed" means what they say it means. The parties *agree* that licenses were exchanged, but disagree on the inferences properly drawn from that fact.[5] Under California law, undisputed evidence of contractual performance does not create a factual issue as to the contracts' meaning, even if the inferences to be drawn from that evidence sharply conflict. *Wolf v. Walt Disney*, 162 Cal. App. 4th 1107, 1134 (2008). Here, as in *Wolf*, the extrinsic evidence does not conflict, only the inferences do. Therefore, the contracts' meaning is properly decided on summary judgment, and the clear language controls to confer the challenged rights. *See Wolf*, 162 Cal. App. 4th at 1134 n. 18.

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[4] As Plaintiffs' own expert testified, the industry commonly uses the phrase "mechanical license" to cover licenses for DPDs. LeMoine Decl. at Ex. A (Tr. of Sullivan Dep., 340: 9-341:15). And there are numerous examples of DPD rights being granted in agreements titled "Mechanical" licenses. *See generally* Ex. 6b; LeMoine Decl. Ex. J (summary chart of mechanicals).

III. "LOSE YOURSELF" WAS ADMITTEDLY LICENSED FOR DIGITAL USES.

There is no dispute that the composition "Lose Yourself" was licensed for the uses that are challenged in this lawsuit. Opp. at 11. Plaintiffs knew that they had licensed it for such use, but sued for infringement anyway. The admitted license insulates Defendants against Plaintiffs' infringement claim as to "Lose Yourself," no matter how the Court resolves any other issue.[6]

IV. EMINEM AND OTHER CO-AUTHORS GRANTED EXPRESS LICENSES.

Additional licenses from independent sources—Eminem, his co-authors, and co-publishers (collectively "Co-Owners")—explicitly authorize the challenged use of the

[5] The undisputed evidence demonstrates that Aftermath often sent out mechanical license requests even though the controlled composition clause undisputedly already gave them a license. LeMoine Decl. Ex. B (Tr. of Todd Douglas Dep., 100:11-102:9), Ex. C (Tr. of Cynthia Oliver Dep., 69:8-14; 71:10-73:24, 76:6-77:20); Ex. D (Tr. of Chad Gary Dep., 90:5-91:7). For example, Exhibit 6b contains numerous mechanical licenses obtained from the artist Obie Trice even though he is subject to a controlled composition clause that "grant[s]. . . an irrevocable license" in his compositions (i.e., language Plaintiffs acknowledge constitutes a "self-effectuating" license). Ex. 5b (Hoffman Decl Exs D-1 & D-2 at ¶ 12.01(a).

[6] Plaintiffs have indisputably known that they licensed "Lose Yourself" for digital exploitation. Knowing that, they had no basis to sue for infringement. They have never explained how their Complaint, which alleges that Universal had sought licenses but none were ever granted, may be squared with the requirements of Rule 11. Instead, after Defendants filed their summary judgment motion, Plaintiffs purported to terminate the "Lose Yourself" license for tactical purposes, in an effort to resuscitate their claim as to that admittedly licensed composition. *See* Opp. at 15. Regardless of whether Plaintiffs had the right to terminate that grant (and Aftermath contends they did not), the fact is that Aftermath obtained a compulsory license in accordance with the provisions of 17 U.S.C. § 115(b). LeMoine Decl. Ex. F (August 19, 2008 letter from Mr. Pomerantz to Mr. Busch regarding purported termination).

Compositions.[7] In fact, after Defendants filed their Motion, Plaintiffs produced (late) additional documents providing additional authorization for Defendants' challenged distribution. LeMoine Decl., Exs. G & H (Ensign Publishing/Famous Music licenses and revised summary chart).

Plaintiffs claim that the Co-Owners either could only license their fractional share of the Compositions (not the whole), or had no rights to license at all. The first point misstates the law. Co-authors are joint owners who can grant non-exclusive licenses for the *entire* composition. *See Tang v. Putruss*, 521 F. Supp. 2d 600, 604 (E.D. Mich. 2007) ("[E]ach joint author has the right to use or to license the work as he or she wishes. . ."). Non-licensing co-authors are entitled only to an accounting of the proceeds. *Id.* Joint owners may enter into agreements providing that they all must agree before licensing to third parties, *see* Nimmer on Copyright (2007), § 6.10[C], but Plaintiffs have submitted no evidence of any such agreement here.[8]

Neither do Plaintiffs offer any actual evidence in support of their claim that the Co-Owners have exclusively licensed away all of their rights. *See* Opp. at 25. The copyright registrations create the presumption that the Co-Owners hold the rights licensed to Defendants, and Plaintiffs offer nothing to rebut that. 17 U.S.C. § 401(c); *Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.*, 510 F.3d 77, 94 n. 16 (1st Cir. 2007). As for Eminem, Plaintiffs aver that he has no rights to transfer himself because he transferred 100% of his interests in the copyrights of the Compositions to them.[9] Martin Decl. ¶ 2, Ex. B-1. Plaintiffs' own documents prove that this is false. By amendment, undisclosed by Mr. Martin's declaration, Eminem decreased the percentage transferred from 100% to 50%. LeMoine Decl., Ex, I at ¶ 4.

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[7] Plaintiffs' arguments to exclude these documents are addressed in Defendants' Opposition to Plaintiffs' Motion to Exclude.

[8] The only agreements Plaintiffs have submitted that limit Co-Owners' rights are among co-authors that Defendants do not rely on for authorization in this motion. *See* Opp'n Exs. B-8-B-15. As a result, Plaintiffs' claims to exclusively control their interests are immaterial.

[9] This argument has no bearing on the rights granted in the Agreements. Plaintiffs' affiliate LLC, F.B.T., was a party to the 1998 Agreement, and its members and managing agent expressly agreed to and accepted the provisions of the 2003 Agreement. Nor does Eminem's purported assignment of his copyright interests to Plaintiffs affect the authority of Eminem's co-authors or co-publishers to grant the challenged rights. Plaintiffs' contention that Eminem had no rights to grant in the Compositions – even if accepted by the Court – would affect only the grants of license made by Eminem in the Shady-Aftermath Amendment and the Soundtrack Agreement. Since the grants in those agreements were supplemental to grants Defendants separately received

Even if Eminem or Co-Owners assigned their rights or agreed only to license a Composition if all co-authors agreed, Plaintiffs offer no evidence that Aftermath had any *notice* of such an assignment. The copyright law protects a non-exclusive licensee who licenses in good faith, without notice that the copyright owner has previously transferred the rights. 17 U.S.C. § 205(e). But here, the only evidence in the record of Aftermath's knowledge consists of Eminem's representation to Aftermath that he *had* the rights to license. *See* Ex. 16 (Ex. B, subpart (d)); Ex. 17, ¶14 at (f)(ix). Without evidence that Aftermath had notice of any alleged agreement assigning away Co-Owner rights, Aftermath's interests are protected. *See* Nimmer on Copyright (2007), § 6.10[C], §10.07[B].

V. PLAINTIFFS' REMAINING ARGUMENTS AGAINST THE EFFECTIVENESS OF THE CO-AUTHOR LICENSES FAIL.

Plaintiffs knowingly use the declaration of an incompetent "expert" – Patrick Sullivan – to advance a number of legal arguments that Plaintiffs chose not to fit within the page limits of their opposition.[10] These arguments are not just procedurally improper but meritless.

First, Plaintiffs argue that the licenses are not "assignable." But Defendants have not assigned them. The licenses encompass distribution by others by their explicit terms. Where licenses are not to "Aftermath," they are undisputedly in the name of the applicable record label distributing the record. *See* LeMoine Decl., Ex. J (summary chart responding to Sullivan Ex. C-2); Ex. K (summary chart responding to Sullivan Ex. C-3). No "assignment" has taken place.

Second, Plaintiffs claim the "First Use" doctrine requires Defendants to obtain consent from all co-owners before licensing for any "First Use," but that doctrine applies only to

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for those compositions in the Agreements and from Co-Authors, Plaintiffs' argument is immaterial. See LeMoine Decl., Ex. H (chart summarizing grants of rights in Compositions).

[10] Defendants are filing a separate motion to strike the declaration on that basis.

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compulsory licenses (not privately negotiated licenses, at issue here), *see* 17 U.S.C. § 115(a)(1), and in all events does not apply to a "first use" in each separate configuration. *See* Ex. 8a at 32-33. (Copyright Office Decision).

Third, Plaintiffs claim that iTunes' international distribution is not covered under these licenses. This case does not seek damages for alleged extraterritorial infringements, *see Palmer v. Braun*, 376 F.3d 1254, 1258 (11th Cir. 2004) (federal copyright law does not apply outside the U.S.), and in any event, Plaintiffs know that rights have been secured for foreign distribution through collecting rights societies. LeMoine Decl. Ex. L (Tr. of Eddy Cue Dep.)

VI. AFTERMATH INDISPUTABLY CAN PASS THROUGH RIGHTS TO APPLE.

Plaintiffs argue that Apple must obtain its own distribution license. The law is otherwise. Plaintiffs' own "expert" concedes that the law "appears to grant labels the ability to sublicense musical compositions, especially DPDs, to online retailers, once the labels have obtained proper licenses." Sullivan Decl. Ex. C-1 at 14. In fact, that is exactly what the law provides. Section 115 explicitly allows a license-holder "to distribute *or authorize distribution of*" a licensed Composition as a DPD. 17 U.S.C. § 115(c)(3)(A) (emphasis added). The Copyright Act thus expressly sanctions the distribution of DPDs via what Sullivan describes as "the iTunes model." Sullivan Decl. Ex. C-1 at 14. Indeed, Sullivan acknowledges that a direct licensing relationship with online retailers is something publishers want, but *do not have* under existing copyright law, because legislative efforts to change the existing model have failed. *See id*. at 15.[11]

VII. AT A MINIMUM, PLAINTIFFS GRANTED AN IMPLIED LICENSE.

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[11] Plaintiffs' separate contention that Aftermath cannot pass through its license to Apple because the latter is a "licensee," not a distributor, is meritless. Not only are Plaintiffs trying to litigate here the distributor-licensee issue that is being litigated in Los Angeles – notwithstanding Plaintiffs' telling the Court the issues in the two cases were completely separate in opposing venue-transfer – but the plain language of the Agreements expressly grants the composition rights to Aftermath and its "distributors" and "licensees." Ex. 9a, Hoffman Decl. at Exs. A& D, ¶ 6. Hence, it does not matter whether Apple is a distributor or a licensee, because the rights are granted to both.

Even if there were not overwhelming evidence that Plaintiffs and others with the right to do so granted Aftermath express licenses, summary judgment *still* would have to be entered because Plaintiffs *to this day* have been accepting payment for the very uses they challenge. In these circumstances, the law implies a license. Moreover, because that license is supported by consideration—specifically, money—that license is irrevocable. *Asset Marketing Systems v. Gagnon*, ____ F.3d _____, 2008 WL 4138181 at * 8 (9th Cir. Sept. 9, 2008). Plaintiffs' arguments against the implied license are meritless.

First, Plaintiffs argue that the recording agreements contemplated the delivery of sound recordings only, not compositions. This is absurd.[12] Compositions are embodied *within* sound recordings. Delivering the recording necessarily delivers the composition. *See Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990) (delivery of special effects footage is delivery of part of film for distribution); *I.A.E. Inc. v. Shaver*, 74 F.3d 768, 777 (7th Cir. 1996) (architect's preliminary drawings delivered and incorporated into final plans).

Second, Plaintiffs now argue—after accepting payments for digital distribution for five years, including throughout this litigation—that they never intended to allow the Compositions to be distributed digitally. The intent element in implied license focuses on the *objective* evidence of the licensor's intent—specifically, its decision to pocket money rather than demand a halt to the now-challenged conduct—rather than its litigation-inspired protestations about what it *subjectively* intended. *See Danielson v. Winchester-Conant*, 322 F.3d 26, 42 (1st Cir. 2003).[13]

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[12] This argument also conflicts with the express provisions of yet another agreement Plaintiffs' affiliate LLCs are party to. That Co-Publishing Agreement with Ensign Music Publishing described the 1998 Agreement and committed Ensign to its terms. That Co-Publishing Agreement explicitly acknowledged that the 1998 Agreement "cover[ed], among other things, the licensing and use of musical compositions." LeMoine Decl. Ex. M, ¶ 19(a). Plaintiffs' argument to the contrary here is disingenuous to say the least.

[13] Plaintiffs' claim that it would have been too onerous to segregate and refuse payments for digital distribution is specious. Plaintiffs could have asked UMG to reissue a check without payment for digital distribution, though they would have had to give up money, which Plaintiffs obviously found irresistible. Notably, when Plaintiffs thought they could achieve some tactical end by sending back what they viewed as a minimal amount of money (UMG's payment for the statutory license to "Lose Yourself"), Plaintiffs knew how to do that. LeMoine Decl., Ex. N.

Third, Plaintiffs assert they did not realize until February of 2006 that the publishing royalties they were receiving included payments for the exploitation of the Compositions in sound recordings in permanent download form. The record evidence is to the contrary.[14] But the Court need not find Plaintiffs incredible to resolve this issue. The *objective* evidence shows that, *even if* Plaintiffs were ignorant that they were getting money for digital distribution until February 2006, Plaintiffs continued to accept payment for the challenged uses for over two years, including as recently as August 29. LeMoine Decl., Ex. P.

Based on the objective evidence, as a matter of law, Plaintiffs have granted an implied license for the challenged uses, and summary judgment must be granted to Defendants.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs have failed to meet their burden of establishing a genuine issue of material fact. Defendants' Revised Motion should be granted.

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(Of course, that effort was entirely ineffective because the statutory license is an express license created by statute, not a license created by implication.)

[14] Plaintiffs, through their FBT and Em2M LLCs (also controlled by Joel Martin) receive quarterly record royalty statements for the distribution of the sound recordings. Plaintiffs' counsel acknowledges that those statements – sent to exactly the same address as statements for royalties on the compositions –reflect royalties for "permanent downloads, streaming, ringtones and mastertones." LeMoine Decl ¶ 17, Ex. O. Indeed, at the same time Plaintiffs were before this Court claiming that the publishing royalty statements obscured Defendants' digital distribution, Plaintiffs were before the Court in Los Angeles submitting these record royalty statements clearly indicating the sale as permanent downloads of recordings embodying the Compositions. *Id*

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel.

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